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## CIMB BANK BHD v. AMBANK (M) BHD & ORS

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF CJ
ZAINUN ALI FCJ
ABU SAMAH NORDIN FCJ
B AZIAH ALI FCJ
JEFFREY TAN FCJ
[CIVIL APPEAL NO: 01(f)-20-06-2016(B)]
16 AUGUST 2017

C ***LAND LAW:*** *Indefeasibility of title and interests – Forged charge – Bank acquired property under forged documents – Whether bank an immediate or subsequent purchaser – Whether bank a holder of subsequent interest in property – Whether bank's interest in property indefeasible – Whether chargee comes within meaning of purchaser under s. 340(3) of National Land Code*

D By a loan agreement, Southern Bank Berhad ('SBB') granted loan facilities to Ching Ting Seng and Ching Chong Lup ('the Chings'). As security for the loan, the Chings executed a charge of a piece of land ('the said land'), which was registered in favour of SBB. The business of SBB was vested unto CIMB Bank Berhad ('the appellant'). Subsequently, one Wong Chee Kong ('Wong') E applied for a loan from AmBank (M) Berhad ('the first respondent') to finance his purchase of the said land, with the said land as the security. The first respondent appointed Messrs KK Lim & Associates ('M/s KK Lim') to prepare the charge of the said land in favour of the first respondent. Messrs Ku Abdul Rahman & Associates ('M/s Ku Abdul Rahman') prepared the sale F and purchase agreement between the Chings and Wong. Later, M/s Ku Abdul Rahman informed M/s KK Lim that Wong had settled the differential sum between the purchase price and the loan sum and that the Chings had settled the loan sum due to the appellant. Accordingly, M/s KK Lim presented the purported discharge of charge, the memorandum of transfer by G the Chings to Wong, and the memorandum of charge by Wong in favour of the first respondent together with what purported to be the original document of title (version 6) ('security documents') for registration. The security documents were presented for registration and the registering authority registered the purported discharge of charge, the transfer by the Chings to Wong and the charge by Wong in favour of the first respondent. H Subsequently, the appellant commenced proceedings to declare the charge in favour of the first respondent as null and void, and to reinstate its charge of the said land. After a full trial, the trial court found that: (i) that the discharge of charge purportedly signed by the appellant had been forged; (ii) the purported document of title (version 6) was not issued by the registering I authority; and (iii) the registering authority was negligent to have acted on

the version 6 document of title. The trial court additionally found that Wong had created a charge of the said land by forging the signature of the attorney of the appellant and registering the same as a discharge of charge to enable the current charge over the said land in favour of the first respondent to be registered. The High Court, in deciding in favour of the appellant, ruled that the first respondent was an immediate purchaser and hence their interest was not protected by the principle of deferred indefeasibility under the proviso to s. 340(3) of the National Land Code ('NLC'). The Court of Appeal, however, held that the first respondent was a subsequent purchaser whose interest was protected by the proviso to s. 340(3) of the NLC in accordance with the deferred indefeasibility principle. Leave to appeal to this court was granted to the appellant on a single question of law of whether a chargee comes within the meaning of 'purchaser' under the proviso to s. 340(3) of the NLC.

**Held (dismissing appeal with costs)**
**Per Md Raus Sharif CJ (for the majority):**

**(1)** The first respondent had derived interest as chargee of the property from Wong and not the appellant. The appellant's charge was discharged before Wong was registered as the proprietor of the property. Further, the financing of the property involved a two stage transaction. The sequence of presentation of the dealing was: (i) the lodgement of the discharge of the appellant's charge *via* Form 16N; (ii) the lodgement of the memorandum of transfer from Chings to Wong; and (iii) the lodgement and registration of the first respondent's charge. The lodgement of the first respondent's charge could not have been created until the first two steps had been executed. That being the case, the only way the first respondent obtained their interest was from Wong and not the appellant. (paras 32 & 33)

**(2)** This court agreed with the Court of Appeal's reasoning that the appellant's interest in the property had been extinguished by the forged discharge resulting in Wong becoming the immediate purchaser. The first respondent then derived their interest in the property from the charge executed by Wong. Under such circumstances, there could not be any relationship between the appellant and the first respondent. When the first respondent became the chargee from Wong's memorandum of charge, the first respondent became the subsequent purchaser. The fact that Wong's interest being an immediate purchaser was defeasible by the appellant did not affect the indefeasibility of the first respondent's interest. (para 33)

**(3)** The first respondent was thus a subsequent purchaser. The first respondent, being a chargee, was a holder of subsequent interest in the property and thus, was protected by the proviso to s. 340(3) of the NLC. This court therefore answered the question posed to this court in the affirmative. Clearly, a charge comes within the meaning of purchaser under the proviso to s. 340(3) of the NLC. (paras 34 & 35)

**Per Jeffrey Tan FCJ (dissenting):**

**(1)** A chargee is a purchaser within the meaning of the proviso. But the interest of a charge is defeasible, if the chargee were not a subsequent purchaser in good faith and for valuable consideration. Whether a purchaser is an immediate or subsequent transfer is not determined by a tally of the number of transactions. Transactions could be contrived by fraudsters and accomplices. A purchaser is a subsequent purchaser only if his title or interest were derived from an immediate purchaser (his vendor) in good faith and for valuable consideration. For the title or interest of the subsequent purchaser to be indefeasible, both immediate and subsequent purchasers must be purchasers in good faith and for valuable consideration. (para 90)

**(2)** In the instant case, Wong was not a purchaser. Even if Wong could be a purchaser, he was not a purchaser in good faith. Since Wong was not a purchaser in good faith, Wong could not be the immediate purchaser in good faith and for valuable consideration. As there was no immediate purchaser in good faith and for valuable consideration, the interest of the first respondent was immediate and defeasible. This appeal ought to have been allowed and the orders of the trial court against the first respondent ought to be restored. (paras 89, 91 & 92)

**(3)** Immediate indefeasibility gives certainty. But unless a security system is statutorily in place to prevent fraud and forgery, such as, but not limited to, the attendance of parties before the registering authority, as well as an indemnity scheme to compensate proprietors for the errors of the registering authority, deferred indefeasibility should remain, to protect innocent proprietors against fraud and forgery. (para 93)

***Bahasa Malaysia*** *Headnotes*

Melalui perjanjian pinjaman, Southern Bank Berhad ('SBB') memberikan kemudahan pinjaman kepada Ching Ting Seng dan Ching Chong Lup ('Chings'). Sebagai sekuriti pinjaman, Chings telah melaksanakan gadaian sebidang tanah ('tanah tersebut') yang didaftarkan memihak pada SBB. Urusan SBB diberi kepada CIMB Bank Berhad ('perayu'). Seterusnya, seorang Wong Chee Kong ('Wong') memohon untuk pinjaman daripada AmBank (M) Berhad ('responden pertama') untuk membiayai pembelian

tanah tersebut, dan tanah tersebut sebagai sekuriti. Responden pertama melantik Tetuan KK Lim & Associates ('Tetuan KK Lim') untuk menyediakan gadaian tanah tersebut memihak pada responden pertama. Tetuan Ku Abdul Rahman & Associates ('Tetuan Ku Abdul Rahman') menyediakan perjanjian jual beli antara Chings dan Wong. Kemudiannya, Tetuan Ku Abdul Rahman memaklumkan Tetuan KK Lim bahawa Wong telah menyelesaikan jumlah perbezaan antara harga belian dan jumlah pinjaman dan bahawa Chings telah menyelesaikan jumlah pinjaman yang terhutang kepada perayu. Berikutan itu, Tetuan KK Lim mengemukakan pelepasan gadaian, memorandum pindah milik oleh Chings kepada Wong, dan memorandum gadaian oleh Wong memihak pada responden pertama bersama-sama dengan dokumen hak milik asli (versi 6) ('dokumen-dokumen sekuriti') untuk pendaftaran. Dokumen sekuriti diserahkan untuk pendaftaran dan pihak berkuasa pendaftaran mendaftarkan pelepasan gadaian, pemindahan hak milik oleh Chings kepada Wong dan gadaian oleh Wong memihak pada responden pertama. Kemudian, perayu memulakan prosiding bagi mengisytiharkan gadaian memihak pada responden pertama sebagai terbatal dan tidak sah, dan untuk mengembalikan semula gadaian perayu ke atas tanah tersebut. Selepas perbicaraan penuh, mahkamah bicara mendapati (i) sebagai fakta, pelepasan gadaian yang ditandatangani oleh perayu telah dipalsukan; (ii) dokumen hak milik (versi 6) tidak diisukan oleh pihak berkuasa pendaftaran; dan (iii) pihak berkuasa pendaftaran cuai apabila mengambil tindakan atas dokumen hak milik versi 6. Mahkamah bicara juga mendapati bahawa Wong telah mewujudkan gadaian tanah tersebut dengan memalsukan tandatangan wakil perayu dan mendaftarkan yang sama sebagai pelepasan gadaian bagi membolehkan gadaian semasa ke atas tanah tersebut memihak pada responden pertama didaftarkan. Mahkamah Tinggi, dalam membuat keputusan memihak pada perayu, memutuskan bahawa responden pertama adalah pembeli serta merta, dengan itu kepentingannya tidak dilindungi oleh prinsip ketakboleh-sangkalan tertunda bawah proviso s. 340(3) Kanun Tanah Negara ('KTN'). Mahkamah Rayuan, walau bagaimanapun, memutuskan bahawa responden pertama adalah pembeli berikutnya yang kepentingannya dilindungi oleh proviso s. 340(3) KTN menurut prinsip ketakboleh-sangkalan tertunda. Rayuan untuk merayu dibenarkan kepada perayu atas persoalan undang-undang sama ada pemegang gadaian terangkum dalam maksud 'pembeli' bawah proviso s. 340(3) KTN.

**Diputuskan (menolak rayuan dengan kos)**
**Oleh Md Raus Sharif KHN (keputusan majoriti):**

**(1)** Responden pertama memperolehi kepentingan sebagai pemegang gadaian tanah daripada Wong dan bukan daripada perayu. Gadaian perayu telah dilepaskan sebelum Wong didaftarkan sebagai pemilik harta tersebut. Selanjutnya, pembiayaan tanah tersebut melibatkan

transaksi dua peringkat. Urutan pembentangan transaksi adalah: (i) penyerahan pelepasan gadaian perayu melalui Borang 16N; (ii) penyerahan memorandum pemindahan hak milik dari Chings ke Wong; dan (iii) akhir sekali penyerahan dan pendaftaran gadaian responden pertama. Penyerahan gadaian responden pertama tidak boleh diwujudkan sehingga dua langkah pertama dilaksanakan. Dengan itu, responden pertama hanya memperoleh kepentingan daripada Wong dan bukan perayu.

**(2)** Kepentingan perayu dalam tanah tersebut telah dipadamkan oleh pelepasan gadaian yang dipalsukan mengakibatkan Wong menjadi pembeli serta merta. Responden pertama kemudiannya memperoleh kepentingannya dalam tanah itu daripada gadaian yang dilaksanakan oleh Wong. Dalam keadaan sedemikian, tiada perhubungan antara perayu dan responden pertama. Apabila responden pertama menjadi pemegang gadaian daripada memorandum gadaian Wong, responden pertama menjadi pembeli berikutnya. Fakta bahawa kepentingan Wong sebagai pembeli serta merta boleh disangkal oleh perayu tidak menjejaskan ketakboleh-sangkalan kepentingan responden pertama.

**(3)** Oleh itu, responden pertama adalah pembeli berikutnya. Responden pertama, sebagai pemegang gadaian, adalah pemegang kepentingan berikutnya dalam tanah dan dengan itu dilindungi oleh proviso s. 340(3) KTN. Mahkamah dengan itu menjawab soalan yang ditujukan kepada mahkamah secara afirmatif. Jelas sekali, satu gadaian terangkum dalam maksud pembeli bawah proviso s. 340(3) KTN.

**Oleh Jeffrey Tan HMP (menentang):**

**(1)** Pemegang gadaian adalah pembeli dalam maksud proviso. Tetapi kepentingan gadaian boleh disangkal jika pemegang gadaian bukan pembeli berikutnya dengan suci hati dan bagi balasan bernilai. Sama ada pembeli adalah pembeli serta merta atau berikutnya tidak ditentukan melalui jumlah bilangan transaksi. Transaksi boleh dibuat oleh penipu dan rakan jenayah. Pembeli adalah pembeli berikutnya hanya jika hak milik atau kepentingannya diperoleh daripada pembeli serta merta (vendornya) dengan suci hati dan bagi balasan bernilai. Untuk hak milik atau kepentingan pembeli berikutnya menjadi tidak boleh disangkal, kedua-dua pembeli serta merta dan berikutnya harus pembeli dengan suci hati dan bagi balasan bernilai.

**(2)** Dalam kes ini, Wong bukanlah pembeli. Jika Wong adalah pembeli, dia bukanlah pembeli dengan suci hati. Oleh kerana Wong bukan pembeli dengan suci hati, Wong tidak boleh menjadi pembeli serta merta dengan suci hati dan bagi balasan bernilai. Oleh kerana tiada pembeli serta merta dengan suci hati dan bagi balasan bernilai, kepentingan responden

pertama adalah serta merta dan boleh disangkal. Rayuan ini harus dibenarkan dan perintah-perintah mahkamah bicara terhadap responden pertama patut dipulihkan.

**(3)** Ketakboleh-sangkalan serta merta memberikan kepastian. Tetapi melainkan jika sistem keselamatan berlaku untuk menghalang penipuan dan pemalsuan, seperti, tetapi tidak terhad pada, kehadiran pihak-pihak di hadapan pihak berkuasa pendaftaran, dan juga skim indemniti untuk memberi pampasan kepada pemilik bagi kesalahan pihak berkuasa pendaftaran, ketakboleh-sangkalan tertunda harus kekal, bagi melindungi pemilik-pemilik tidak bersalah menentang penipuan dan kepalsuan.

**Case(s) referred to:**

*Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC* ***(refd)***
*Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA* ***(refd)***
*Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1995] 4 CLJ 45 HC* ***(refd)***
*Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA* ***(refd)***
*Daito Kogyo (Sarawak) Sdn Bhd v. Port Dickson Land Development Sdn Bhd [2001] 8 CLJ 131 HC* ***(refd)***
*Development & Commercial Bank Bhd v. Kim Ming Choon [1991] 1 CLJ 732; [1991] 2 CLJ (Rep) 548 HC* ***(refd)***
*Dial Kaur Tara Singh v. Mann Foong Realty Sdn Bhd [2000] 4 CLJ 93 CA* ***(refd)***
*Gibbs v. Messer [1891] AC 248* ***(refd)***
*Heveaplast Marketing Sdn Bhd v. See Leong Chye & Ors And Other Appeals [2017] 2 CLJ 43 CA* ***(refd)***
*Ho Tack Sien & Ors v. Rotta Research Laboratorium S.p.A & Anor; Registrar Of Trade Marks (Intervener) & Another Appeal [2015] 4 CLJ 20 FC* ***(refd)***
*Home Trust Co v. Zivic (2007) 277 DLR (4th) 349* ***(refd)***
*Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC* ***(refd)***
*Kasai Reiko v. Annie Lor Lee Fong & Ors; Public Bank Bhd (Intervener) [2014] 3 CLJ 869 HC* ***(refd)***
*Kuala Lumpur Finance Bhd v. Yap Poh Khian & Ors [1991] 3 CLJ 1805; [1991] 3 CLJ (Rep) 75 HC* ***(refd)***
*Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC* ***(refd)***
*Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng [1995] 3 CLJ 520 CA* ***(refd)***
*M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC* ***(refd)***
*Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230* ***(refd)***
*Malayan United Finance Bhd v. Tan Lay Soon [1991] 2 CLJ 899; [1991] 1 CLJ (Rep) 292 SC* ***(refd)***
*Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan [1989] 1 LNS 115 HC* ***(refd)***
*Malaysia Building Society Bhd v. KCSB Konsortium Sdn Bhd [2017] 4 CLJ 24 FC* ***(refd)***
*OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim [1999] 2 CLJ 949 CA* ***(refd)***

*Ong Ban Chai & Ors v. Seah Siang Mong [1998] 3 CLJ 637 CA* ***(refd)***
*Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC* ***(refd)***
*Public Bank Bhd v. Phan Seng Kee & Ors [1991] 3 CLJ 2560; [1991] 3 CLJ (Rep) 491 HC* ***(refd)***
*Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors [2016] 4 CLJ 510 CA* ***(refd)***
*Score Options Sdn Bhd v. Mexaland Development Sdn Bhd [2012] 7 CLJ 802 FC* ***(refd)***
*State Tailor Sdn Bhd v. Nallapan [2005] 2 CLJ 167 CA* ***(refd)***
*T Damodaran v. Choe Kuan Him [1979] 1 LNS 107 PC* ***(refd)***
*Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC* ***(refd)***
*Taylor v. Land Mortgage Bank of Victoria Ltd (1886) 12 VLR 748* ***(refd)***
*Teh Cheng Choo v. Malayan Banking Bhd [2009] 5 CLJ 463 CA* ***(refd)***
*The Bank of Nova Scotia Bhd v. Saunah Kasni & Ors [2016] 1 CLJ 505 HC* ***(refd)***
*Wright v. Lawrence 278 DLR (4th) 698* ***(refd)***

**Legislation referred to:**
Companies Act 1965, s. 108(3)(e)
National Land Code, ss. 5, 205(1), 206, 214, 221, 241, 267(1)(a), 278, 282, 294(2), 306(a), 340(1), (2)(b), (c), (3)

**Other source(s) referred to:**
Judith Sihombing, *National Land Code – A Commentary*, 2nd edn, 826
RJ Smith, *Forgeries and Land Registration (The Law Quarterly Review),* 1985, Vol 101, 79
Pamela O'Connor, *Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems*, Edin LR Vol 13, pp 194-223

*For the appellant - Karen Wilfred; M/s Rashid Zulkifli*
*For the 1st respondent - Benjamin John Dawson, Koh San Tee & Chan Shao Kang; M/s Benjamin Dawson*
*For the 2nd & 3rd respondents - Nik Suhaimi Nik Sulaiman & Naziah Mokhtar; State Legal Advisor, Selangor*

*[Editor's note: For the Court of Appeal judgment, please see Ambank (M) Berhad v. CIMB Bank Berhad & Ors [2015] 1 LNS 1500 (affirmed); For the High Court judgment, please see CIMB Bank Bhd v. Ambank (M) Bhd & Ors [2015] 10 CLJ 184 (overruled).]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Md Raus Sharif CJ (majority):**

### Introduction

**[1]** This is an appeal against the decision of the Court of Appeal given on 30 September 2015 in reversing the decision of the High Court. The High Court had on 8 July 2014 found in favour of the appellant (CIMB) in respect of competing claims with the first respondent (AmBank) over their respective charges on the same piece of land.

**[2]** Leave to appeal to this court was granted to the appellant on 17 September 2016 on a single question of law which reads: A

> Whether a chargee comes within the meaning of 'purchaser' under the proviso to section 340(3) of the National Land Code 1965.

**[3]** For ease of reference, we will refer the parties in this appeal as they were referred to at the High Court. B

**Background Facts**

**[4]** Chin Ting Seng and Chin Chong Lup (the Chins) were at the material time, owners of a piece of land situated at Seksyen 21, Mukim Bandar Klang, District of Klang, State of Negeri Selangor (the property). On 23 March 2006, the Chins had executed a charge on the property in favour of Southern Bank Berhad (SBB) as security for a banking facility. On 6 September 2006, the banking business of SBB was vested with CIMB. C

**[5]** On 4 November 2008, one Wong Chee Keong (Wong) applied for a loan from AmBank to finance the purchase of the property which would be used as a security for the loan (the AmBank charge). AmBank appointed Messrs KK Lim & Associates (KKL) as their solicitors to prepare the necessary documentation including the creation of the charge over the property in favour of AmBank. KKL conducted the relevant property searches, made the appropriate enquiries and also obtained all the necessary undertakings and confirmations from the solicitors acting in the sale and purchase transaction between the Chins and Wong. D E

**[6]** The firm of solicitors acting for Wong was Messrs Ku Abdul Rahman & Associates (KAR). On 11 February 2009, by way of a letter, KAR informed KKL of the followings: F

(a) the differential sum between the balance purchase price and the loan sum had been settled by Wong;

(b) the vendors ie, the Chins had settled the outstanding loan due to CIMB and they were awaiting the original title deed and duly executed discharge of charge to be released by CIMB; and G

(c) KAR undertook to forward to KKL the duly adjudicated and stamped memorandum of transfer (the MOT) together with the original title deed and the discharge of charge.

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**[7]** On 10 March 2009, KKL received from KAR:

(a) the original deed of the property (IDT version 6);

(b) the duly stamped MOT; and

(c) the discharge of charge of the CIMB charge. I

**[8]** On 17 March 2009, KKL received from KAR the duplicate of the CIMB charge forwarded on a letter dated 16 March 2009. On 19 March 2009, KKL presented, *inter alia*, the discharge of CIMB's charge, the MOT, and the AmBank charge together with the IDT version 6 (the security documents), at the land office.

**[9]** On 7 April 2009, KKL on behalf of AmBank forwarded a cashier's order No: 724209 for RM1,910,000 being the balance purchase price to KAR. On 7 April 2009, KAR credited the balance purchase price into their account maintained with Al-Rajhi Bank.

**[10]** On 25 November 2009, the land office effected the discharge of CIMB's charge and registered Wong as the registered proprietor of the property. Thereupon AmBank was registered as the chargee of the property.

**[11]** It was discovered later that the discharge of the CIMB's charge was forged. There were two titles over the property. The claims by CIMB and AmBank as chargees over the same property became the core of the dispute in this case.

**At The Courts Below**

**[12]** On 8 July 2014, the High Court decided in favour of CIMB. The trial judge ruled that AmBank was an immediate purchaser and hence their interest was not protected by the principle of deferred indefeasibility. In other words, AmBank being an immediate purchaser was not entitled to the protection under the proviso of s. 340(3) of the National land Code (NLC). The trial judge said it in the following words:

> In view of my finding that the said discharge of the charge and the signature on the same was forged, the purported transfer of interest from Plaintiff (CIMB) to the 1st Defendant (AmBank) is one of immediate indefeasibility and the proviso of subsection 3 of section 340 of the NLC do not apply and section 340(2)(b) of the NLC would kick in and the interest of the 1st Defendant (AmBank) would not be indefeasible and would be liable to be set aside. The 1st Defendant (AmBank) was the immediate holder of the charges and that being the case, the 1st Defendant (AmBank) cannot take advantage of the proviso of subsection 3 of section 340 of the NLC.

**[13]** On 30 September 2015, the Court of Appeal allowed AmBank's appeal. The Court of Appeal held that AmBank was a subsequent purchaser whose interest was protected by the proviso of s. 340(3) of the NLC in accordance with the deferred indefeasibility principle.

**Decision Of This Court**

**[14]** The only question that calls for our determination was whether a chargee comes within the meaning of 'purchaser' under the proviso of s. 340(3) of the NLC. Thus, if a chargee does not come under the meaning

of purchaser, then AmBank was an immediate purchaser and in such a situation AmBank's interest as chargee was not protected by the principle of deferred indefeasibility. However, if a chargee comes within the meaning of purchaser, then AmBank was a subsequent purchaser, and thus was protected by s. 340(3) of the NLC.

**[15]** This concept of indefeasibility of title or interest is found in s. 340 of the NLC which reads as follows:

> Section 340. Registration to confer indefeasible title or interest, except certain circumstances.
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name, any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy;
>
> (b) where the registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection 2:
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this subsection shall effect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> (4) Nothing in this section shall prejudice or prevent:
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> (b) the determination of any title or interest by operation of law.

**[16]** Section 340 of the NLC referred to indefeasibility of title or interest. Section 340(1) of NLC itself provides a clear understanding that interest means lease, charge or easement. In fact, the Privy Council in *T Damodaran v. Choe Kuan Him* [1979] 1 LNS 107; [1972] MLJ 267 had occasion to consider the scope and meaning of 'interest' under the NLC. Lord Diplock who delivered the judgment of the court said:

> **interest in land**, short of proprietorship, which are capable of being registered are **leases, charges and easements**.
>
> (emphasis added)

**[17]** Similarly, this court in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 had described the legal position of a chargee as a holder of interest in land. Arifin Zakaria CJ (Malaya) (as he then was) held:

> However, we are of the opinion that the appellant bank (which is a chargee), being the holder of subsequent interest in the Land is protected by the proviso to section 340(3) of the NLC.

**[18]** The above view of Arifin Zakaria CJ (Malaya) (as he then was) is consistent with the definition of 'purchaser' in s. 5 of the NLC as:

> a person or body who in good faith and for valuable consideration acquires title to, or any interest in land.

Clearly, the definition of purchaser in s. 5 is not limited to the purchaser who acquires the title to land but includes those who has acquired interest in land.

**[19]** In fact, this issue whether a chargee comes within the meaning of purchaser in the proviso of s. 340(3) of the NLC was not decided upon by the courts below. The sole issue determined by the High Court and the Court of Appeal was whether AmBank was an immediate or a subsequent purchaser. It is also important to note that the courts below did not make any finding that AmBank was not a *bona fide* purchaser or chargee. On the contrary, the trial judge had in his grounds of judgment found that AmBank and their solicitors (KKL) had acted properly and diligently. The trial judge said:

> AmBank appointed Messrs K K Lim & Associates (KKL) as their solicitors for the financing transaction. Their duties, *inter alia*, entails the preparation of the security documents, namely the creation of a charge over the property in favour of AmBank. KKL conducted the relevant searches, made the appropriate enquiries, and also obtained all the necessary undertakings and confirmation from the solicitors acting in the sale and purchase agreement between the Chings and Wong.

**[20]** The Court of Appeal also did not find that there was any lack of *bona fide* on the part of AmBank. As stated earlier, the Court of Appeal proceeded with the appeal on the sole issue of whether the AmBank was an immediate or a subsequent purchaser. They found that AmBank was a subsequent purchaser and protected by s. 340(3) of the NLC.

**[21]** Before us, the arguments put forward by learned counsel for the appellant (CIMB) may be summarised as follows. Wong, the chargor only acquired defeasible title to the property which is liable to be set aside within s. 340(2)(b) of the NLC. Once it is established that Wong acquired no title to the property, he cannot be found to have given any charge on such impugned title. Hence, the charge created by Wong in favour of AmBank, which is dependent on the validity of the title of the chargor, must necessarily be set aside. The legal title to the property is presently registered in the name of Wong and following the principle enunciated by the Supreme Court in *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14; [1994] 1 MLJ 294, Wong has not abrogated his right to AmBank's charge. No judicial sale has taken place in respect of the property and following s. 267(1)(a) of the NLC, no title or interest of the chargor, namely Wong, has passed or vested in a third party. In support, learned counsel cited the Court of Appeal case of *OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim* [1999] 2 CLJ 949 as the authority.

**[22]** It was further submitted that in the present case, AmBank's charge was registered with the presentation of the forged discharge of charge form and forged issue document of title (version 6). Thus, to uphold AmBank's contention that the charge is valid and indefeasible as a subsequent purchaser within the proviso to s. 340(3) of the NLC would be a return to the position propounded by this court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133; [2001] 1 MLJ 214, where a purchaser obtained good title notwithstanding the title was procured by the presentation of a forged instrument of transfer. And the decision in *Adorna Properties* having been expressly overruled by this court in *Tan Ying Hong* as being *per incuriam* on the point that the proviso to s. 340(3) of the NLC of a *bona fide* purchaser for value was available as a defence for the immediate holder of registered title effected by means of fraud or forgery.

**[23]** With respect, we are unable to subscribe to the said arguments. As rightly pointed out by the Court of Appeal, the law on the concept of indefeasibility was settled and well established when the judgment of this court in *Adorna Properties* was overruled by *Tan Ying Hong*. In order to appreciate the decision of this court in *Tan Ying Hong* which basically overruled *Adorna Properties*, it is necessary to reveal as to what actually transpired in *Adorna Properties*.

**[24]** In *Adorna Properties*, Mrs Boonsom Boonyanit a Thai national owned two pieces of land in Tanjong Bungah, Penang. A rogue forged her signature, sold and subsequently transferred her two pieces of land to Adorna Properties. She discovered the fraud only after Adorna Properties was registered as the owner of the two pieces of land. She brought an action against Adorna Properties in order to have her name restored on the register

as the owner of the property. During the trial, Adorna Properties argued that as an innocent third party purchaser for value, its title was indefeasible notwithstanding the forged signature on the memorandum of transfer and relied on s. 340 of the Code.

**[25]** The High Court in interpreting the above provisions held that even if the instrument of transfer was forged, Adorna Properties had nevertheless acquired an indefeasible title over the property by virtue of s. 340(3) of the Code, which protects any title or interest acquired by any purchaser in good faith and for valuable consideration (see *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1995] 4 CLJ 45; [1995] 2 MLJ 863). Hence, the High Court ruled in favour of Adorna Properties.

**[26]** The Court of Appeal interpreted the above provisions differently (see *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17; [1997] 2 MLJ 62). The Court of Appeal held that the words 'any purchaser' in s. 340(3) of the Code refers to a subsequent and not to an immediate purchaser. Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal held (at pp. 45 (CLJ); 85-86 (MLJ)):

> ... the words 'any purchaser' appearing in the proviso to s. 340(3) do not include a registered proprietor whose immediate title is rendered defeasible by one or more of the vitiating elements specified in the second sub-s to s 340 of the Code. Any other construction would, in our view, denude sub-s. (2) of all effect. The section should be read as making defeasible the title of a proprietor who gets onto the register by means of one or more of the methods specified in the second subsection. However, if such a registered proprietor were to dispose of the land to a third party who, in good faith, pays the purchase price, then, the latter, as well as all those who come onto the register after him, take title free of any taint.

**[27]** Accordingly, the Court of Appeal decided in favour of Mrs Boonsom Boonyanit. However, the Federal Court overruled the decision of the Court of Appeal. Eusoff Chin CJ reasoned as follows (at p. 139 (CLJ); p. 246 (MLJ)):

> The proviso to sub-s. (3) of s. 340 of the NLC dealt with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s. (3) this category of registered proprietors so that these proprietors are not caught by main provision of this subsection. Who are these proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s. (3). For this category of registered proprietors, they obtained immediately indefeasibility notwithstanding that they acquired their titles under a forged document.

> We therefore, agree with the High Court judge that, on the facts of this case, even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to the said lands.

**[28]** This court in *Tan Yin Hong*, held that the Federal Court in *Adorna Properties* had misconstrued s. 340(1), (2) and (3) of the NLC and came with erroneous conclusion that the proviso appearing in sub-s. (3) equally applied to sub-s. (2). Arifin Zakaria CJ (Malaya) put it in the following:

> 49. The question is, does the proviso following immediately after sub-s. (3), apply to the other provisions of s. 340, in particular to sub-s. 2(b). This can only be deduced from the proviso itself. *NS Bindra*'s, *Interpretation of Statutes*, 9th edn, at p. 110 states that: "A proviso is something engrafted on a preceding enactment. The proviso follows the enacting part of a section and is in a way independent of it. Normally, it does not enlarge the section, and in most cases, it cuts down or makes an exception from the ambit of the main provision". A proviso to a subsection would not apply to another subsection (*M/s Gajo Ram v. State of Bihar AIR* [1956] Pat 113). A proviso carves out an exception to the provision immediately preceding the proviso and to no other (*Ram Narain Sons Ltd v. Ass Commr of Sales - tax AIR* [1955] SC 765).

**[29]** With regard to the proviso to sub-s. 3, Arifin Zakaria CJ (Malaya) went on to hold:

> 51. We are of the view that the proviso is directed towards the provision of subsection (3) alone and not to the earlier subsection. This in our view is supported by the use of words "in this subsection" in the proviso. Therefore, its application could not be projected into the sphere or ambit of any other provisions of s. 340".

**[30]** Arifin Zakaria CJ (Malaya) went further to explain:

> 52. Furthermore, even though sub-s. (3)(a) and (b) refer to the circumstances specified in sub-s. (2) they are restricted to subsequent transfer or to interest in the land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in any land. Therefore, a person or body in the position of *Adorna Properties* could not take advantage of the proviso to the sub-s. (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s.(3) ought not to be extended as was done by the Court in *Adorna Properties*, to apply to sub-s. (2)(b). By so doing the court had clearly gone against the clear intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.
>
> 53. For the above reasons, with respect, we hold that the Federal Court in *Adorna Properties* had misconstrued s. 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in

A sub-s. (3) equally applies to sub-s. (2). By so doing the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s. 340 of the NLC.

**[31]** This concept of indefeasibility was further explained by this court in the case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; B [2014] 2 MLRA 432; [2014] 2 MLJ 768 where Jeffrey Tan FCJ said:

> [41] Before we adjourn, we would summarise the foregoing and pass on the following, as a guide to the trial courts. Whenever a registered title or interest is sought to be set aside under s. 340, first ascertain whether the title or interest under challenge is registered in the name of an C immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser, the *bona fide* of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s. 340(2) had been made out. If the title or interest is registered in the name of a subsequent purchaser, then D the vitiating elements in s. 340(2) would not affect the title or interest of a *bona fide* subsequent purchaser. The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a *bona fide* subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith for a valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, E is indefeasible.

**[32]** This was exactly what the courts below did in the present case. But they came to different conclusions. The High Court found AmBank as an immediate purchaser while the Court of Appeal found AmBank as the subsequent purchaser. Basically, the Court of Appeal agreed with learned F counsel from AmBank that the trial judge in deciding that AmBank was an immediate purchaser had failed to appreciate the following:

(a) AmBank had derived interest as chargee of the property from Wong and not CIMB;

G (b) CIMB's charge was discharged before Wong was registered as the proprietor of the property; and

(c) the financing of the property involved a two-stage transaction.

**[33]** Thereafter, the Court of Appeal went on to hold:

H > [26] We found merits in the aforesaid contention and our reasons were these. As pointed out by learned counsel, the sequence of presentation of the dealing on 25 November 2009 was as follows:
>
> (a) The lodgment of the Discharge of CIMB's Charge *via* Form 16N;

I

(b) Then the lodgment of the memorandum of transfer from Chings to Wong; and

(c) Finally the lodgment and registration of AmBank's Charge.

[27] Though the above dealings were on the same day and were done simultaneously, it cannot be disputed nor can we ignore the fact that the lodgment of the AmBank's Charge could not have been created until the first two steps had been executed. That being the case, the only way AmBank obtained their interest was from Wong and not CIMB. CIMB's interest in the property had been extinguished by the forged discharge resulting in Wong becoming the immediate purchaser. AmBank then derived their interest in the property from the charge executed by Wong. Under such circumstances, there cannot be any relationship between CIMB and AmBank, and hence the learned Judge, with respect, erred when he said "it is clear that the relationship between the Plaintiff (CIMB) and the 1st Defendant (AmBank) was that of an immediate purchaser and not a subsequent purchaser ...". When AmBank became the chargee from Wong's memorandum of charge, AmBank became the subsequent purchaser.

[28] Further, we said that the fact that Wong's interest being an immediate purchaser was defeasible by CIMB did not, in our view, affect the indefeasibility of AmBank's interest. Our view is supported by the two decisions of the Apex Court, namely *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLRA 432; [2014] 2 MLJ 768 and *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 1 MLRA 1; [2010] 2 MLJ 1.

**[34]** We are in total agreement with the reasoning of the Court of Appeal. AmBank must be a subsequent purchaser. As discussed earlier, AmBank, being a chargee was a holder of subsequent interest in the property and thus, was protected by the proviso of s. 340(3) of the NLC.

**[35]** We therefore answer the question posed to this court in the affirmative. Clearly, a chargee comes within the meaning of purchaser under the proviso to s. 340(3) of the NLC. Accordingly, we dismiss the appeal with costs.

**Jeffrey Tan FCJ (dissenting):**

**[36]** This is an appeal against the decision of the Court of Appeal who reversed the decision of the trial court and held that the charge of the first respondent over land held under GM7794 for Lot 23223 Seksyen 21 Mukim Bandar Klang, District of Klang, Selangor (said land) was indefeasible and thus prevailed over the prior charge in favour of the appellant.

**[37]** The following background facts are not in dispute. By a loan agreement dated 17 March 2006, Southern Bank Berhad (SBB) granted loan facilities to one Ching Ting Seng and Ching Chong Lup (the Chings). As security for the loan, the Chings executed a charge of the said land, which was registered on 23 March 2006, in favour of SBB. On 6 September 2006, the business of SBB was vested unto the appellant.

**[38]** On 14 November 2008, one Wong Chee Kong (Wong) applied for a loan from the first respondent to finance his purchase of the said land, with the said land as the security. The first respondent appointed Messrs KK Lim & Associates (KK Lim) to prepare the charge of the said land in favour of the first respondent. Messrs Ku Abdul Rahman & Associates (Ku Abdul Rahman) prepared the sale and purchase agreement between the Chings and Wong. Later, Ku Abdul Rahman informed KK Lim that Wong had settled the differential sum between the purchase price and the loan sum and that the Chings had settled the loan sum due to the appellant and were awaiting receipt of the original document of title and the discharge of charge. Ku Abdul Rahman gave an undertaking to forward the duly adjudicated and stamped memorandum of transfer together with the original document of title and discharge of charge to KK Lim.

**[39]** On 10 March 2009, KK Lim received from Ku Abdul Rahman the purported document of title (version 6) of the said land, the duly stamped memorandum of transfer of the said land, and the purported discharge of charge executed by the appellant. On 17 March 2009, KK Lim received what purported to be the duplicate charge from Ku Abdul Rahman. On 19 March 2009, KK Lim presented the purported discharge of charge, the memorandum of transfer by the Chings to Wong, and the memorandum of charge by Wong in favour of the first respondent together with what purported to be the original document of title (version 6) (hereinafter collectively referred to as the security documents) for registration.

**[40]** On 7 April 2009, first respondent, through KK Lim, forwarded a cashier's order No. 724209 for RM1,910,000, it being the purported balance purchase price, to Ku Abdul Rahman who credited that sum into its account.

**[41]** Upon enquiry on 17 September 2009, KK Lim was informed that the security documents were rejected for registration by reason of the letter of Ku Abdul Rahman dated 30 March 2009. On 25 November 2009, the security documents were again presented for registration. This time, the registering authority registered the purported discharge of charge, the transfer by the Chings to Wong, and the charge by Wong in favour of the first respondent.

**[42]** On or about 2 May 2012, the appellant commenced proceedings to declare the charge in favour of the first respondent as null and void, and to reinstate its charge of the said land. That was followed by the counterclaim of the first respondent against the registering authority, for breach of duty.

**[43]** After a full trial, without Wong as litigant or witness, the trial court found (i) "as a fact that the discharge of charge purportedly signed by the (appellant) had been forged", (ii) the purported document of title (version 6) was not issued by the registering authority, and (iii) the registering authority was negligent to have acted on the version 6 document of title. The trial court additionally found "that (Wong) created a charge of the said land by forging the signature of the attorney of the (appellant) and registering the same as a discharge of charge to enable the current charge over the said land in favour of the (first) respondent to be registered".

**[44]** The Court of Appeal agreed that "at the trial it was established that the discharge of charge had been forged". Both courts below held that the discharge of charge was a forgery. But the courts below differed as to whether the respondent was an immediate or a subsequent purchaser.

**[45]** The trial court stated that s. 340 of the National Land Code (NLC) "affords protection to a subsequent purchaser". The trial court was of the view that "the position of the (first respondent) *vis-a-vis* the (appellant), in my view is that the (first respondent) is not a subsequent purchaser but a direct purchaser of the interest registered as a charge for the creation of a charge in favour of the (first respondent), based on a discharge of charge purportedly executed by the (appellant) (which is denied) which then allowed a charge to be registered in the name of the (first respondent). It follows therefore that the (first respondent) is an immediate purchaser of the interest and is subject to immediate indefeasibility. This however is liable to be set aside in the event (that) s. 340 sub-s. (2)(b) has been breached". Given its finding that the discharge of charge was a forgery, the trial court went on to hold that s. 278 of the NLC had not been complied to effect a discharge of the said land, and that the charge in favour of the first respondent should be set aside.

**[46]** Before the trial court, the first respondent argued that the first respondent was a purchaser in good faith and for valuable consideration, and that the proviso (proviso) to sub-s. (3) of s. 340 of the NLC applied, as the immediate purchaser, Wong, and the creation of the charge had put the first respondent in the position of a subsequent purchaser. But the trial court held that given that the discharge of charge was a forgery and that s. 278 of the NLC had not been complied, all issue of the first respondent being a subsequent purchaser could not arise and that the proviso could not apply.

**[47]** At p. 17 of its judgment, the trial court thus enunciated on the defeasibility or indefeasibility of title of the first respondent:

> In view of my finding that the said discharge of charge and the signature on the same were forged, the purported transfer of interest from the [Appellant] to the [1st Respondent] is one of immediate indefeasibility and the proviso in subsection (3) of 340 of the NLC does not apply, and 340(2)(b) of the NLC would kick in and the interest of the [1st Respondent] would not be indefeasible and would be liable to be set aside. The [1st Respondent] was the immediate holder of its charge and that being the case, the [1st Respondent] cannot take advantage of the proviso ...

**[48]** The trial court granted the orders sought by the appellant against the first respondent and the orders sought by the first respondent against the registering authority.

**[49]** At the Court of Appeal, the first respondent submitted that the trial court failed to appreciate that the first respondent derived interest from Wong and not the appellant, that the charge in favour of the appellant was discharged before Wong was registered as proprietor, and that "the financing of the property involved a two-stage transaction".

**[50]** The Court of Appeal expressed total agreement with the latter submission of the first respondent:

> We found merit in the aforesaid contention and our reasons were these. As pointed out by learned counsel, the sequence of presentation of the dealing on 25.11.2009 was as follows:
>
> (a) The lodgement of the Discharge of CIMB's Charge *via* Form 16N.
>
> (b) Then the lodgement of the memorandum of transfer from the Chings to Wong; and
>
> (c) Finally the lodgement and registration of Ambank's Charge.
>
> Though the above dealings were on the same day and were done simultaneously, it cannot be disputed nor can we ignore the fact that the lodgement of the AmBank's Charge could not have been created until the first two steps had been executed. That being the case, the only way AmBank obtained their interest was from Wong and not from CIMB. CIMB's interest in the property had been then extinguished by the forged discharge resulting in Wong becoming the immediate purchaser. AmBank then derived their interest in the property from the charge executed from Wong. Under such circumstances, there cannot be any relationship between CIMB and AmBank, hence the learned Judge, with respect, erred when he said "... it is clear that the relationship between the Plaintiff (CIMB) and the 1st Defendant (AmBank) was that of an immediate purchaser and not a subsequent purchaser ..." When AmBank became the chargee from Wong's memorandum of charge, AmBank became the subsequent purchaser.

> Further, we said that the fact that Wong's interest being an immediate purchaser was defeasible by CIMB did not, in our view, affect the indefeasibility of AmBank's interest. Our view is supported by two decisions of the apex Court, namely *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* reported in [2014] 1 CLJ 987 and *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 MLJ 1.

**[51]** For those reasons, the Court of Appeal allowed the intermediate appeal and set aside all orders of the trial court.

**[52]** The appellant obtained leave to appeal to this court on the following question of law:

> Whether a chargee comes within the meaning of 'purchaser' under the proviso to section 340(3) of the National Land Code?

**[53]** Before us, the appellant submitted as follows. The question of law ought to be answered in the negative. A chargee cannot be regarded as a subsequent purchaser. A charge is subservient to the title to the land. Where the chargor's title is defeasible, he cannot create any interest in favour of a third party. The first respondent could not be a subsequent purchaser and was not entitled to the proviso, as the first respondent's charge, which could not subsist on its own, was dependent on the title of Wong who was the fraudster and who acquired no title whatsoever by the presentation of false instruments. The first respondent's charge, being a derivative interest from a title obtained by forgery, was tainted with the same forgery. The defeasibility of title to the said land rendered the charge created out of such defeasible title also defeasible and liable to be set aside. The charge of the first respondent was defeasible because its registration was obtained by forged documents. The case was not within the proviso, even if the first respondent were innocent. Whether the first respondent was complicit in the forgery was irrelevant. The following could be concluded from the undisputed facts: (a) the discharge of charge was a forgery, and its registration was void *ab initio*, (b) the transfer of the said land and the charge were registered on the basis of the forged discharge of charge, (c) a forged document of title was used to procure registration of the transfer and the charge, (d) the appellant had not parted with possession of the document of title (version 2) and the duplicate charge, (e) consequently, registration of the transfer to Wong and the charge in favour of the first respondent were procured by forged documents and were void *ab initio*, (f) the document of title (version 3) in the possession of the first respondent was tainted with illegality, as it was procured by the presentation of forged instruments with a forged pelan tanah. The argument that the first respondent was a subsequent purchaser in good faith and for valuable consideration and the attempt to separate the two transactions, namely, the transfer by the Chings to Wong on the one part and the charge in favour of the first respondent of the other

part, was untenable for the following reasons: (i) removal of the appellant as chargee and registration of the first respondent as chargee were carried out in one continuous transaction together with the transfer of the said land by means of forged documents, (ii) the charge in favour of the first respondent could not have been registered but for the forged discharge of charge and forged document of title (version 6), (iii) the document of title (version 3) in the possession of the first respondent was issued on 21 December 2009, that is, after creation of the charge in favour of the first respondent on 25 November 2009, as a direct consequence of the registration of forged instruments, (iv) *Tan Ying Hong* at [26] was inconsistent with itself at [8], [10] and [11], (v) the first respondent failed to properly investigate the circumstances of the sale from the Chings to Wong; a search would have revealed that there were pending foreclosure proceedings and that the appellant had an interest in the said land. The argument that the first respondent was a subsequent purchaser in good faith and for valuable consideration was unmaintainable, as Wong, who procured title by forged documents from which he created a charge in favour of the first respondent, acquired no title to the land. In *The Bank of Nova Scotia Bhd v. Saunah Kasni & Ors* [2016] 1 CLJ 505, the court held that the charge created out of a defeasible transfer must necessarily be avoided. In *Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors* [2016] 4 CLJ 510, the Court of Appeal drew a distinction between indefeasibility and validity of title. The Court of Appeal held that the fact that the defendant purchased the said land in good faith and for value did not confer indefeasibility if the title to such land was void at inception, that is, that the second document of title was a void document of title, it being issued during the subsistence of the valid document of title. Following the reasoning in *Rajamani*, the document of title (version 3) in the instant case was void, as it was issued during the subsistence of the real document of title (version 2) in the possession of the appellant. Pursuant to s. 294(2) read together with s. 306(a) of the NLC, the presentation of the discharge of charge must be accompanied by the document of title and duplicate charge. In the instant case, both signature and attestation of the discharge of charge as well as the document of title (version 6) with the pelan tanah were forgeries. The discharge of charge was an invalid instrument to determine the appellant's interest in the said land in accordance with s. 206 of the NLC. Registration of the charge in favour of the first respondent, which was based on forged and invalid documents, was defeasible under s. 340(2)(b) of the NLC. Forgery under s. 340(2)(b) of the NLC is a distinct ground of defeasibility, where knowledge is wholly irrelevant. Forgery *per se* suffices to render a registered title defeasible, irrespective of the knowledge of the first respondent. Forgery as a distinct ground of defeasibility is clear from the express wording of s. 340(2)(b) of the NLC. That position in law was endorsed in *Tenure and Land Dealings in*

*the Malay States* (Singapore University Press 1975) at 361 to 363 by David SY Wong, and adopted by the Court of Appeal in *OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim* [1999] 2 CLJ 949. The first respondent's charge was similar to *OCBC* as analysed by *Tan Ying Hong*. In *Tan Ying Hong*, the Federal Court held that the immediate holder of the registered charge procured by a forged power of attorney could not take advantage of the proviso. The Federal Court overruled *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133; [2001] 1 MLJ 214, where it was held that the proviso was available to an immediate purchaser in good faith and for valuable consideration. In *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768, the Federal Court held that immediate purchasers were not entitled to the proviso. Wong, who procured title by the forged discharge of charge and forged document of title (version 6) with the forged pelan tanah, could not be an immediate purchaser. Wong acquired no title whatsoever to create the charge in favour of the first respondent. Following the reasoning in *Kamarulzaman*, the first respondent was an immediate purchaser, and the title, which was procured by forged instruments, was defeasible. The first respondent was not a *bona fide* purchaser, as registration of the charge was obtained by forged documents, and as the first respondent failed to properly investigate all matters that pertained to the sale and creation of the charge (counsel cited *Gibbs v. Messer* [1891] AC 248 and *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136). A proper search would have disclosed (i) that the purchase by Wong was completed on 25 November 2009, when the said land was then the subject of foreclosure proceedings by the appellant, and (ii) that there was an obvious irregularity on the face of the discharge of charge which wrongly stated that CIMB was formerly known as Southern Bank Berhad. There was no CTOS or CCRIS search conducted on the Chings. The loan was disbursed before the transfer to Wong and the charge to first respondent was confirmed. The entire transaction which led to the removal of the charge in favour of the appellant was set in motion by the grant of the loan to Wong. The appellant had no relationship with Wong who was the first respondent's customer. Yet the first respondent failed to procure Wong to testify, to prove that the first respondent was a subsequent purchaser. The Court of Appeal was mistaken that the only issue was whether the first respondent was an immediate or subsequent purchaser. The Court of Appeal failed to consider that the document of title (version 6) with the pelan tanah was a forgery, and that a charge cannot subsist on its own. The charge, which was obtained by forgery, should be set aside.

**[54]** The first respondent submitted as follows. 'Interest' in land includes a charge (counsel cited *T Damodaran v. Choe Kuan Him* [1979] 1 LNS 107; [1979] 2 MLJ 267b, *Tan Ying Hong* at [26], *Daito Kogyo (Sarawak) Sdn Bhd*

*v. Port Dickson Land Development Sdn Bhd* [2001] 8 CLJ 131; [2001] 2 MLJ 531, and ss. 205, 214, 221, 241, 282, 340(1) of the NLC). The term 'purchaser' extends to all with an interest in the land. That is supported by s. 5 of the NLC which defines 'purchaser' as "a person or body who in good faith and for valuable consideration acquires title to, or any interest in land". In *Score Options Sdn Bhd v. Mexaland Development Sdn Bhd* [2012] 7 CLJ 802; [2012] 6 MLJ 475, the Federal Court applied *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng* [1995] 3 CLJ 520; [1995] 1 MLJ 719, where it held that interest under the NLC are leases, charges and easements. In *Tan Ying Hong*, the Federal Court analysed the decision in *OCBC* where it was held by the Court of Appeal that the title of the chargee bank was not indefeasible, and held at [26] that the reasoning in *OCBC* was flawed. In *Tan Ying Hong*, the Federal Court expressly referred to the chargee bank as a subsequent purchaser protected by the proviso, and explicitly accepted that a chargee was a purchaser. In *Teh Cheng Choo v. Malayan Banking Bhd* [2009] 5 CLJ 463, the land was fraudulently transferred to one Lim Ong Ah who fraudulently charged the land. At [27], the Court of Appeal held that Malayan Banking was a *bona fide* purchaser and thus was protected by the proviso. In *Heveaplast Marketing Sdn Bhd v. See Leong Chye & Ors And Other Appeals* [2017] 2 CLJ 43, the Court of Appeal likewise decided that a chargee bank is a purchaser within the meaning of the proviso. In *Kasai Reiko v. Annie Lor Lee Fong & Ors; Public Bank Bhd (Intervener)* [2014] 3 CLJ 869; [2014] 7 MLJ 652, Lee Swee Seng J came to the same conclusion that a chargee bank who derived interest from a fraudster fell within the definition of 'purchaser'. In *'National Land Code – A Commentary* (2nd edn)' at 826, Judith Sihombing stated that the term purchaser "extends to all taking an interest in the land, for example a lessee or charge". In '*Indefeasibility of Title in Malaysia – The Revivification of Deferred Indefeasibility under the Torrens Systems – Focus on Fraudulently Obtained and Forged Titles*' at 139, Grace Xavier said that "the persons in whose name the title had been registered, then transfers the title to another ... or creates a charge on the property, then the subsequent person will obtain indefeasibility, or indefeasibility of the charge ... ". Under the principle of deferred indefeasibility, so long as the financial institution is *bona fide*, its interest is protected by the proviso. It would have far-reaching consequences if financial institutions were excluded as purchasers. In *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14; [1994] 1 MLJ 294, the former Supreme Court qualified the *nemo dat* principle and said that a *bona fide* purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. The appellant had strayed from the leave question. At no time was it argued in the courts below that a charge would not come within the meaning of 'purchaser'. The sole question in the court below was whether the

respondent was an immediate or subsequent purchaser. Both courts below held that a chargee is a purchaser. There was no finding that the first respondent was not a *bona fide* chargee/purchaser. The trial court held that the first respondent and solicitors acted properly, and that the appellant and first respondent were defrauded by a third party. The Court of Appeal did not find that there was any lack of *bona fides* on the part of the first respondent. On the issue of whether the first respondent was an immediate or subsequent purchaser, the Court of Appeal said that that was a matter of fact. The analysis of *OCBC* in *Tan Ying Hong* made the former case squarely within the instant case. The decision in *Tan Ying Hong*, *to wit*, that a chargee bank has an interest and is entitled to protection under the proviso, was wholly applicable to the instant case.

**[55]** In its reply submission, the appellant responded as follows. A charge is not an interest acquired by a purchaser within the meaning of the proviso. A charge is dependent on the validity of the title of the charger. In *M & J Frozen Food*, the former Supreme Court referred to *Taylor v. Land Mortgage Bank of Victoria Ltd* (1886) 12 VLR 748, where it was said that in the Torrens system, "the estate and interest in the land remains with the proprietor until he has done all that is necessary to divest the estate out of himself and vest it in the transferee". The former Supreme Court said that the aforesaid principle was embodied in s. 267(1)(a) of the NLC, and that s. 267(1)(a) of the NLC "clearly negates any judicial proposition that the chargor abdicates his proprietary rights at the stage of the auction sale". In *Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd* [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230, the Federal Court held that "the mortgagor retains ownership whilst the mortgagee acquires a statutory right to enforce his security" (on the rights of a chargor and chargee, counsel also referred to *Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan* [1989] 1 LNS 115; [1990] 1 MLJ 317, *Development & Commercial Bank Bhd v. Kim Ming Choon* [1991] 1 CLJ 732; [1991] 2 CLJ (Rep) 548, *Kuala Lumpur Finance Bhd v. Yap Poh Khian & Ors* [1991] 3 CLJ 1805; [1991] 3 CLJ (Rep) 75; [1992] 1 MLJ 472, *Public Bank Bhd v. Phan Seng Kee & Ors* [1991] 3 CLJ 2560; [1991] 3 CLJ (Rep) 491; *Malayan United Finance Bhd v. Tan Lay Soon* [1991] 2 CLJ 899; [1991] 1 CLJ (Rep) 292; [1991] 1 MLJ 504). In *M & J Frozen Food*, the former Supreme Court referred to and followed *Gibbs v. Messe*r, where the vendor's title was good but the instrument used by the purchaser for registration was void and or voidable, and where the Privy Council held that the effect of registration of such instrument only conferred deferred indefeasibility. The principles enunciated in *M & J Frozen Food* established that a charge is a species of security transaction where the chargor remains the registered proprietor until registration of a valid transfer in the name of a purchaser under a judicial sale. Wong acquired a defeasible title. Once it was established that Wong acquired

A no title, then Wong could not create a charge out of his title. Following the principles in *M & J Frozen Food*, Wong had not abrogated his rights to the said land. In *OCBC*, the Court of Appeal held that the registered title or interest of an acquirer obtained by forgery was defeasible. A forged instrument is a nullity which does not confer any right or title to the
B transferee. Such transferee has no right to charge or create any interest in land which is not his. A chargee who claims title through an immediate acquirer who obtained his title by forgery is not protected by the proviso. Following OCBC, a chargee cannot be a 'purchaser' within the meaning of the proviso, as the chargee takes his interest through the immediate acquirer whose title
C is tainted by forgery. Implicit in *OCBC* is that a charge is a species of derivative interest that is subject to the infirmities of the title of the proprietor. The contention that the first respondent was a subsequent purchaser in good faith and for valuable consideration was unmaintainable, as Wong who procured title by forged documents had not acquired any interest whatsoever. The first respondent was not a subsequent purchaser,
D and whose charge was defeasible. To hold that the first respondent as a subsequent purchaser would return to *Adorna Properties*, where it was held that the purchaser obtained a good title, *albeit* that the title was procured by a forged transfer. In *Tan Ying Hong*, the Federal Court ruled that the charge was liable to be set aside, as the charge as created by the use of a forged power
E of attorney, and held that the immediate holder of the charge procured by the forged power of attorney could not take advantage of the proviso. The statement of law in *Tan Ying Hong* with respect to *OCBC* was flawed, as it was an opinion in respect of a hypothetical question and is no authority that *OCBC* could be decided differently if the same facts were to arise. In *Tan Ying*
F *Hong*, the Federal Court answered that an acquirer of a registered charge by means of a forged instrument does not acquire an immediate indefeasible interest or title. *OCBC* was consistent with the *ratio decidendi* in *M & J Frozen Food* which was referred to with approval in *Tan Ying Hong*. In *Bank of Nova Scotia Berhad v. Saunah Kasni and Ors,* it was held that the charge created by
G the chargor who obtained title by forgery was defeasible, and that a charge is not an interest in land. *Teh Cheng Choo v. Malayan Banking Berhad* was decided before *Tan Ying Hong*. The decision in *Heveaplast Marketing Sdn Bhd v. See Leong Chye & Ors,* where the title of the chargor was defeasible and it was held that the chargee was a subsequent purchaser, was wrong in law. The
H decision in *Kasai Reiko v. Annie Lor Fong & Ors (Public Bank Bhd – Intervenor),* where the charge was created after the chargor was registered as proprietor and it was held that the chargee was a purchaser in good faith, is untenable in law. The first respondent had the burden to prove that it was a purchaser in good faith and for valuable consideration, and that the transfer to Wong was valid.

I

**[56]** In its reply submission, the first respondent submitted as follows. All proposed leave questions to do with forgery were rejected by the leave panel. All findings of the Court of Appeal remained intact. The leave question only required an affirmative or negative answer. The appellant could not ventilate issues on forgery (counsel cited *Ho Tack Sien & Ors v. Rotta Research Laboratorium S.p.A & Anor; Registrar Of Trade Marks (Intervener) & Another Appeal* [2015] 4 CLJ 20; [2015] 4 MLJ 186, where the appellant was confined to the two leave questions which incorporated a point of law and not permitted to seek a reversal of the findings of fact of the courts below). The appellant could not go beyond the leave question. A chargee is a purchaser (learned counsel again cited ss. 5, 205, 241, 340(1) of the NLC, *Score Options Sdn Bhd v. Mexaland Development Sdn Bhd*, *Tan Ying Hong* at [26], *T Damodaran v. Choo Kuan Him* at 269*, Teh Cheng Choo v. Malayan Banking Berhad, Heveaplast Marketing Sdn Bhd v. See Leong Chye & Ors).* A *bona fide* purchaser for value who acquires title from the immediate purchaser obtains an indefeasible title (learned counsel cited *Kamarulzaman* at [16] and [46]). A registered proprietor, even though he does not possess an indefeasible title, may give an indefeasible title to a *bona fide* purchaser (learned counsel cited *Tan Ying Hong* at [46] which cited '*Sale and Purchase of Real Property in Malaysia*' by Visu Sinnadurai). The argument that a charge is dependent on the validity of the chargor's title is contrary to s. 340(2) and (3) of the NLC. It was settled by *Tan Ying Hong* and *Kamarulzaman* that a defeasible title can be the root of good title to a *bona fide* purchaser. *M & J Frozen Food* recognised that the *nemo dat* principle had been modified. The facts in *M & J Frozen Food* were different. In *M & J Frozen Food*, it was a one-stage transaction, and the proviso did not come into play. In the present case, it was a two-stage transaction, first the transfer and then the charge. The appellant relied on *OCBC*, a decision that was held as flawed. It was incorrect to suggest that the first respondent advocated a return to *Adorna Properties*. "We are simply applying the deferred indefeasibility principles under the proviso to the facts of the present case, to the first respondent who was a subsequent purchaser in a two-stage transaction. *Adorna Properties* was wrongly decided because it applied the proviso to s. 340(2) ... That was set right in *Tan Ying Hong* ... where the Federal Court held that the proviso was only applicable to s. 340(3), ie to subsequent purchaser and not to the immediate purchaser." In line with that, the Federal Court was of the view that OCBC's charge was indefeasible, as OCBC was a subsequent purchaser. As in *OCBC*, the first respondent's charge came about from a two-stage transaction. Section 340(3) of the NLC did not require the first respondent to prove that Wong was an immediate *bona fide* purchaser. The trial court found that the first respondent had made all inquiry and searches. The first respondent had discharged the burden of proof.

**[57]** The second and third respondents, who filed a separate appeal (B01(NCVC(W)-327-08-2014) against the decision of the trial court, but which separate appeal was struck out by reason of the success of the first respondent at the Court of Appeal, took the stand that it was mutually agreed they would file a fresh appeal at the Court of Appeal against the decision of the trial court in the event that the decision here should be against the first respondent. But other than that, the second and third respondents agreed to abide by any order of this court with respect to the competing charges.

**[58]** It was submitted *Tan Ying Hong* at [26] overruled *OCBC* which held that the chargee bank had not acquired an indefeasible title, and that *OCBC* as analysed in *Tan Ying Hong* was on all fours with the facts of the instant case.

**[59]** In *OCBC*, the appellant was the chargee. The charge was created by one Ng See Chow who acquired title through a forged transfer. Ng See Chow failed to repay the loan. The appellant applied and obtained an order for sale of the land. Ng Kim Hwa claimed that the land belonged to him and that he had not executed any transfer of the land to Ng See Chow. A Registrar's caveat was entered against the land to prevent sale by the appellant. Contending that its charge was indefeasible, the appellant applied to have the caveat removed. That application was refused. The appellant appealed. In dismissing the appeal, NH Chan JCA held as follows:

> Now, if we apply this to the facts of the present case, what we have is this. If the registered title of the land (which is in Ng See Chow's name) is defeasible under s. 340(2)(b) because its registration was obtained by forgery, it (ie, Ng See Chow's title) is liable to be set aside at the instance of the true owner Mr Ng Kim Hwa (**even though Ng See Chow was an innocent purchaser for value**) and any interest (for example, any charge or lease) granted by Ng See Chow is similarly liable to be set aside. This is because in s. 340(2) there is no proviso (as there is in s. 340(3)) to protect the innocent purchaser (who is the immediate acquirer) for value or to protect anyone claiming through or under the immediate acquirer (even though that person be an innocent purchaser for value). So that, the chargee which Ng See Chow has granted thereout to the appellant bank (OCBC Bank (M) Bhd) as chargee is not protected because there is no proviso in sub-s (2) to protect the chargee bank which is a person claiming through or under Ng See Chow. The charge, therefore, is also liable to be set aside by Mr Ng Kim Hwa (emphasis added).

**[60]** NH Chan JCA held the proviso applies only to s. 340(3) and not to s. 340(2) of the NLC, and that the proviso does not protect an innocent immediate purchaser, or anyone claiming through or under the immediate purchaser –"... in s. 340(2) there is no proviso (as there is in s. 340(3)) to protect the innocent purchaser (who is the immediate acquirer) for valuable consideration or to protect anyone claiming through or under the immediate acquirer (even though that person be an innocent purchaser for value)".

**[61]** In *Tan Ying Hong*, Arifin Zakaria CJ (Malaya) as he then was, thus remarked on the judgment of NH Chan in *OCBC*:

> [26] NH Chan JCA in delivering the judgment of the Court of Appeal was of the opinion that the proviso to s. 340(3) of the NLC applies exclusively to those situations which are covered by sub-s. (3). The court then went on to hold that the charge granted by Ng See Chow to the appellant was liable to be set aside by the true owner since the title was obtained by forgery. On the facts of that case, we agree that the title of Ng See Chow is defeasible under s. 340(2) of the NLC as he obtained his title through a forged instrument. However, we are of the opinion that the appellant bank, being the holder of subsequent interest in the land is protected by the proviso to s. 340(3) of the NLC. For that reason we are of the view that the finding of the Court of Appeal in that case is to that extent flawed.

**[62]** On account of *Tan Ying Hong* at [26], it was submitted that the first respondent, who likewise was a chargee bank, was also a subsequent purchaser protected by the proviso.

**[63]** To the contrary, it was submitted that *Tan Ying Hong* at [26] was inconsistent with itself at [8], [9] and [11]. For a better understanding of *Tan Ying Hong* at [8], [9] and [11], the judgment of Zaki Azmi CJ should be read from [5]:

> [5] Let us refer to the first owner of a piece of land as 'A' who then transfers the same piece of land to 'B' and which subsequently is transferred to 'C'.
>
> [6] As far as s. 340(1) of the NLC is concerned, A's title to the land is totally indefeasible. In short if A's name appears on the registration, no one can come and claim for that title. The law will not entertain it at all.
>
> [7] Now comes the next person, B, whose name appears in the register. If it can be shown that the title or interests obtained by B was obtained by fraud or misrepresentation by him or anyone else to which he was a party or privy then his claim to the title or interest can be defeated (see s. 340(2)(a) of the NLC). Otherwise, B stands in the same position as A.
>
> [8] The situation where it is proved that the registration in B's name was obtained by forgery or by means of an insufficient or void instrument is the same (see s. 340(2)(b) of the NLC). His title or interest to the land is liable to be set aside by the previous owner who has a good title. In this latter instance, there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument.
>
> [9] The third instance where B's title or interest could be defeated is where it was unlawfully acquired through the exercise of any power or authority conferred by any law. Section 340(2)(c) of the NLC deals with one who was for example acting in his capacity as an agent to a power

of attorney. **Even if C is in the same position as B, sub-s (3) also does not give protection to C unless he can show that he had acquired the title or interest** in good faith and for valuable consideration**. Any title or interest gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in good faith and for valuable consideration**. **This is what is called deferred indefeasibility of title**. If his title or interest is challenged on similar grounds, the burden of proving there was valuable consideration and good faith lies on him. (emphasis added)

[10] As far as I am concerned, that is the simplest way of looking at s 340 of the NLC. I totally agree with the learned Chief Judge of Malaya's view that the error committed by the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 was to read the proviso to sub-s (3) as being a proviso to sub-s (2) as well. The error is very obvious because the proviso expressly refers to 'this sub-section' which must in the context of that subsection be read as proviso to sub-s (3) only.

[11] I am legally obligated to restate the law since the error committed in *Adorna Properties* is so obvious and blatant. It is quite a well known fact that some unscrupulous people have been taking advantage of this error by falsely transferring titles to themselves. I hope that with this decision, the land authorities will be extra cautious when registering transfers.

**[64]** At [7], Zaki Azmi CJ held that the title or interest of B, who obtained the same "by fraud or misrepresentation by him or anyone else to which he was a party or privy" could be defeated. At [8], Zaki Azmi CJ held that the title or interest of B, who obtained the same "by forgery or by means of an insufficient or void instrument" could similarly be defeated and that in the instance of forgery or an insufficient instrument "there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument".

**[65]** Together, at [7] and [8], Zaki Azmi CJ made a distinction between 'title or interest obtained by fraud or misrepresentation' and 'title or interest obtained by forgery or an insufficient instrument' and held that in the case of 'title or interest obtained by forgery or an insufficient instrument' "there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument", which implied that in the case of 'title or interest obtained by fraud or misrepresentation' there is need to show that B was party or privy to the fraud or misrepresentation.

**[66]** At [9], Zaki Azmi CJ held that B's title or interest could be defeated where it was unlawfully acquired through the exercise of any power or authority conferred by any law, that s. 340(2)(c) of the NLC deals with the situation where one, for example, acted in his capacity as an agent to a power of attorney, and that the proviso "does not give protection to C unless he can

show that he had acquired the title or interest in good faith and for valuable consideration. **Any title or interest gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in good faith and for valuable consideration**" (emphasis added).

**[67]** At [10] and [11], Zaki Azmi CJ agreed with Arifin Zakaria CJ (Malaya), as he then was, that the proviso only applied to s. 340(3) of the NLC, and that *Adorna Properties* was wrongly decided.

**[68]** It would not appear that *Tan Ying Hong* at [26] was at odds with itself at [8], [9] or [11]. But what was fascinating in *Tan Ying Hong* at [26] was the view that the chargee in *OCBC* acquired a subsequent interest. A subsequent interest does not spring out of a vacuum. A subsequent interest is acquired from a preceding title or interest. In *OCBC*, the charge was acquired by the chargee from the chargor. By stating that the chargee in *OCBC* acquired a subsequent interest, *Tan Ying Hong* at [26] accepted that the chargor in *OCBC* was the holder of the preceding title or interest, or was the immediate purchaser. It should be noted that there was no finding that the chargor in *OCBC* was party or privy to the forgery. Indeed, it was the finding of NH Chan JCA – "even though Ng See Chow was an innocent purchaser for value" – that the chargor in *OCBC* was a *bona fide* purchaser. As the chargor in *OCBC* was "an innocent purchaser for value", it followed that the chargee in *OCBC* was a subsequent purchaser. Given that the chargor in *OCBC* was "an innocent purchaser for value", *Tan Ying Hong* at [26] was absolutely warranted to the view that the charge in *OCBC* acquired a subsequent interest. It should be emphasised that in *OCBC*, there was an immediate purchaser and a subsequent purchaser, both in good faith and for valuable consideration. It was on account of those facts that *Tan Ying Hong* at [26] said that the chargee in *OCBC* was a subsequent purchaser. In no way was it said in *Tan Ying Hong* at [26] that a chargee *per se* is a subsequent purchaser. It would be fallacious to read *Tan Ying Hong* at [26] to mean that a chargee *per se* is a subsequent purchaser. If a chargee *per se* is a subsequent purchaser, then the result in *Tan Ying Hong* would have been for the chargee bank. But it was not. The result was in favour of Tan Ying Hong, which should scotch all interpretation or belief that *Tan Ying Hong* at [26] ruled that a chargee *per se* is a subsequent purchaser.

**[69]** Whether a chargee is a subsequent purchaser must be decided on a case to case basis. The instant facts were different from *OCBC*. For in the instant case, it was the finding of the trial court, which was wholly undisturbed by the Court of the Appeal, and not challenged by the first respondent that (i) "as a fact that the discharge of charge purportedly signed by the (appellant) had been forged", (ii) the purported document of title (version 6) was not issued by the registering authority, and (iii) "that (Wong) created a charge of

the said land by forging the signature of the attorney of the (appellant) and registering the same as a discharge of charge to enable the current charge over the said land in favour of the (first) respondent to be registered".

**[70]** The finding of the trial court was that Wong forged the signature of the attorney of the appellant on the discharge of charge, and that the document of title (version 6) together with the pelan tanah presented for registration of the transfer to Wong and charge in favour of the first respondent was not issued by the issuing authority. There was no evidence that the transfer was a forgery. But the discharge of charge was a forgery authored by Wong. As author of the forgery, could Wong be a purchaser, let alone a purchaser in good faith and for valuable consideration? If Wong were not a purchaser in good faith and for valuable consideration, then could the first respondent be a subsequent purchaser? If the first respondent were not a subsequent purchaser, then would not its charge be defeasible? Those were the decisive questions that laid at the heart and core of the dispute and its resolution.

**[71]** With respect, the issue was not "whether a chargee comes within the meaning of s. 340(3) of the NLC" as proposed by the leave question. As rightly said by the Court of Appeal and agreed to by the first respondent before us, the issue was whether the first respondent was an immediate or subsequent purchaser. For if the first respondent, though purchaser, were not a subsequent purchaser, then the first respondent only acquired a defeasible interest. But of course, if the answer to the leave question were that a chargee does not come within the meaning of 'purchaser' under the proviso, then this appeal should be decided against the first respondent.

**[72]** This is the appropriate juncture, perhaps even overdue in point of time, to refer to s. 340 of the NLC, which provides:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

**[73]** The proviso provides "that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser". Apparently, the charge was acquired by the first respondent in good faith and for valuable consideration. There was no issue on that. However, it was contended that "a charge is not an interest acquired by a purchaser within the meaning of the proviso".

**[74]** 'Interest' is not explicitly defined in ss. 5 or 340 of the NLC. But that is not to say that the meaning of 'interest' is not spelt out in the NLC. For what is 'interest' could be gathered from the NLC, that is, if the provisions were only read together. Section 205(1) of the NLC provides that "the dealings capable of being effected under this Act with respect to alienated lands and interests therein shall be those specified in parts fourteen to seventeen, and no others". And when read together with parts fourteen to seventeen of the NLC, s. 205(1) of the NLC provides that the dealings capable of being effected under the NLC with respect to alienated lands and interest therein shall be transfers, leases and tenancies, charges and liens, and easements. A transfer, for want of a better word, transfers the alienated land. But a lease, tenancy, charge, lien or easement does not transfer the alienated land. A lease, tenancy, charge, lien or easement create an interest in the alienated land which does not pass but remains with the registered proprietor. And that interest in the alienated land, be it lease, tenancy, charge, lien or easement, is the 'interest' stated in the proviso.

**[75]** Besides s. 205(1) read together with parts fourteen to seventeen of the NLC, the authorities cited by the first respondent also settled it that a charge is an interest in alienated land. In *T Damodaran v. Choe Kuan Him*, it was held by the Privy Council per Lord Diplock, delivering the opinion of the board, that "interests in land, short of proprietorship, which are capable of being registered are leases, charges and easements". In *Tan Ying Hong* at [26], it was held that the chargee in *OCBC* had a (subsequent) interest. In *Daito Kogyo (Sarawak) Sdn Bhd v. Port Dickson Land Development Sdn Bhd*, it was held by Abdul Malik Ishak J, as he then was, that "once a charge is registered it takes effect immediately as security in the form of a legal interest in the land". In *Score Options Sdn Bhd v. Mexaland Development Sdn Bhd*, the Federal Court per Arifin Zakaria CJ, delivering judgment of the court, cited *Luggage Distributor (M) Sdn Bhd v. Tan Hor Teng* where it held by the Court of Appeal per Gopal Sri Ram JCA, as he then was (VC George JCA, Abu Mansor JCA, as he then was, in agreement) that "registrable interests falling short of ownership … are leases, charges and easements".

**[76]** Other authorities not cited by the first respondent also plainly said that a charge is an interest within the proviso. To cite just a few, in *Malaysia Building Society Bhd v. KCSB Konsortium Sdn Bhd* [2017] 4 CLJ 24; [2017] 2 MLJ 557, it was held by the Federal Court per Arifin Zakaria CJ, delivering the judgment of the court, that "under the NLC, a charge is an interest in land". In *Dial Kaur Tara Singh v. Mann Foong Realty Sdn Bhd* [2000] 4 CLJ 93; [2000] 3 MLJ 153, it was held by the Court of Appeal per NH Chan JCA, delivering the judgment of the court, that "a charge is a registered interest in land that is charged to the creditor (chargee) as security for a loan". And in *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44; [1988] 2 MLJ 449, it was held by the former Supreme Court per Seah SCJ that "a charge which affects the company's beneficial interest in land is a charge under s. 108(3)(e) of the Companies Act 1965" (s. 108(3)(e) of the Companies Act, since repealed by the Companies Act 2016, read "a charge on land wherever situate or any interest therein").

**[77]** It is irrefragable that a charge is an interest and that a chargee is a purchaser, both within the meaning of the proviso. The first respondent was a purchaser of interest in the said land. But as said, the real issue was not whether the first respondent was a purchaser, but whether the first respondent was an immediate or a subsequent purchaser.

**[78]** It is now settled that an immediate purchaser acquires a defeasible interest. Only a subsequent purchaser in good faith and for valuable consideration acquires an indefeasible interest. There was a period however when an immediate purchaser acquired an immediate indefeasible interest. That was because of *Adorna Properties*, where it was held by the Federal Court

that the proviso also applied to sub-s. 340(2), with the result that a purchaser of a title or interest, which was defeasible by any one the vitiating elements specified in s. 340(2), acquired an indefeasible title or interest. *Adorna Properties* ruled in favour of immediate indefeasibility. Then came *Tan Ying Hong*, where it was held by the Federal Court that "the Federal Court in *Adorna Properties* misconstrued s. 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s. (3) equally applies to sub-s. (2). By so doing, the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s. 340 of the NLC". In effect, *Tan Ying Hong* put our Torrens system back to deferred indefeasibility, to where it was before, where "it was the orthodox understanding that Malaysia's National Land Code provides for deferred rather than immediate indefeasibility" ('*A Law Which Favours Forgers: Land Fraud In Two Torrens Jurisdictions*' by Tang Hang Wu and Loh Khian Chung (2011) 19 APLJ 130) (for further reading on our Torrens system before *Adorna Properties*, see *Tan Ying Hong* at [18-26] and *Kamarulzaman* at [15-28]).

**[79]** What is the difference between deferred and immediate indefeasibility? In '*Forgeries and Land Registration*' (The Law Quarterly Review 1985 Vol. 101 at 79) RJ Smith explained that forgeries are seen as raising the distinction between immediate indefeasibility and deferred indefeasibility:

> In Torrens systems, forgeries are seen as raising the distinction between immediate indefeasibility and deferred indefeasibility. Immediate indefeasibility protects the registered proprietor simply because he is so described on the register. In our example concerning dispute between A, C and D, both C and D appear on the register and therefore prevail over A who no longer is on the register. Deferred indefeasibility is more subtle. Its analysis is that only when a purchaser relies on a statement in the register does he deserve or receive statutory protection. Thus C's difficulty is that he relies on the transfer wrongly executed by B who forged A's signature. Nothing in the register misled C. As the purpose of the legislation is to cure defects in title rather than defects in conveyances, C's title will not prevail against A. D, however, is in a different position. As C's chargee, he has relied on C's registered title. Accordingly, his title will be defeasible. This is what is called deferred indefeasibility: statutory protection on the next disposition after the forged transfer. After a fierce dispute lasting many decades, the Privy Council ruled in favour of immediate indefeasibility in 1967: *Frazer v. Walker*. The Torrens system would today protect the interest of C against A, although the result was reached after considerable uncertainty.

**[80]** But in Malaysia, it is deferred indefeasibility, where "the registered proprietor does not acquire indefeasible title upon registration but is postponed to one transaction removed from the original transaction involving the use of a defective instrument" ('*A law which favours forgers: Land fraud in two Torrens jurisdictions*' *supra*). The Torrens system here would not protect C against A.

**[81]** In '*Tan Sook Yee's Principles of Singapore Land Law*' (3rd edn) at p. 285,the learned authors thus illustrated (i) the difference between immediate and deferred indefeasibility, and (ii) the defeasibility of title or interest of an immediate purchaser in good faith and for valuable consideration, who would be C in '*Forgeries and Land Registration*' (*supra*) at 79:

> In the early days of Torrens jurisprudence, there was some uncertainty as to whether a registered proprietor obtained an immediate indefeasible title or merely a deferred indefeasible title. An immediate indefeasible title means that the registered proprietor's title becomes indefeasible once his title is registered, notwithstanding that the source of the new registered proprietor's title might be the result of forgery. **A deferred indefeasible title, on the other hand, defers the shield of indefeasibility until the next purchaser**. An illustration of the difference between both theories is as follows: X is the original owner. *Y forges X's signature and sells the property to Z, who was not privy to the forgery. Z registers the transfer and becomes the new registered proprietor. If indefeasibility were conferred immediately, Z's rights over the land will prevail over X's, notwithstanding that Z's title was derived from forged documents. In contrast, under the theory of deferred indefeasibility, Z's rights will not prevail as against X. However, should Z then sell the land to A, A will be able to claim indefeasibility as against X*. Indefeasibility of title is thus conferred to the next purchaser" (emphasis added).

**[82]** Deferred as opposed to immediate indefeasibility was also explained in *Tan Ying Hong* at [20], by espousal of the following commentary in '*The National Land Code, A Commentary*' (Vol 2) by Judith Sihombing at para. 404:

> [20] Indefeasibility can be immediate or deferred. The distinction between the two is well explained in para. 404 of *The National Land Code, A Commentary* (Vol 2) by Judith Sihombing which reads:
>
> > There are two types of indefeasibility; immediate and deferred. The factor which distinguishes the two is the common law effect given to the instrument even after registration; in addition; in a regime of deferred indefeasibility, the role of registered volunteer might be more relevant than under an immediate indefeasibility system. If, after registration has occurred, the system then ignores the substance, form and probity of the instrument used to support the registration, the system is likely that of immediate indefeasibility. Thus, registration has cured any defect in the instrument being registered. **If the instrument, despite registration, still has the power to affect the registered interest or estate, the system will probably be that of deferred indefeasibility**.' (emphasis added)
>
> [21] In short, immediate indefeasibility means that the immediate registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection despite the existence of any vitiating circumstances. **In the case of deferred**

> **indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer**. Thus, the difference between immediate and deferred indefeasibility hinges on the effect of registration *vis-a-vis* the title or interest (emphasis added).

**[83]** That indefeasibility is not absolute and that only a subsequent purchaser in good faith and for valuable consideration acquires an indefeasible title or interest was explained in '*Tenure and Land Dealings in the Malay States*' by David Wong at p. 374 as follows:

> **When a registered title or interest in land is rendered defeasible in any of the circumstances considered above, it is liable to be set aside not only in the hands of its immediate holder but also in the hands of any person to whom it may** subsequently be transferred: so is any lesser interest subsequently granted thereout. **But, such continuing defeasibility will end with respect to any title or interest when it comes to be acquired by 'any purchaser in good faith and for valuable consideration' in whose hands the title or interest will be cured of its past defeasibility**, which accordingly will also not affect any person 'claiming through or under such a purchaser'. All this is stated in section 340(3). Thus, so long as a defeasible title or interest remains on the register and has not been set aside, it is capable of subsequent dealings by its holder. And, indeed, it can be a root of good title in favour of any subsequent purchaser 'in good faith and for valuable consideration (emphasis added).

**[84]** *Tan Ying Hong* at [52] was categorical that the proviso only applies to a subsequent dealing:

> [52] Furthermore, even though sub-s. (3)(a) and (b) refer to the circumstances specified in sub-s. (2) they are restricted to subsequent transfer or to interest in the land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in any land. Therefore, a person or body in the position of *Adorna Properties* could not take advantage of the proviso to the sub-s. (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s. (3) ought not to be extended as was done by the court in *Adorna Properties*, to apply to sub-s. (2)(b). By so doing, the court had clearly gone against the clear intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.

**[85]** *Kamarulzaman* at [15] was equally explicit that indefeasibility under the regime of deferred indefeasibility is not absolute, that a title or interest that is not indefeasible continues to be defeasible (s. 340(2)(a) of the NLC), that any interest subsequently granted thereout is liable to be set aside in the hands of any person or body in whom it is for the time being vested (s. 340(2)(b) of the NLC), and that a defeasible title or interest continues to

be defeasible and will only become indefeasible when title is acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser (proviso):

> [15] … Before *Adorna Properties*, the law on s. 340 could be broadly summarised as follows. 'Upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land, that is a title or an interest which is free of all adverse claims or encumbrances not noted on the register. The effect of registration then is to defeat all prior unregistered claims. Indefeasibility is however not absolute … ' (*Land Law in Malaysia, Cases and Commentary* by Teo Keang Sood & Khaw Lake Tee, (2nd Ed) at p. 134). Indefeasibility is subject to the exceptions in s. 340(2). Under s. 340(2), the title or interest shall not be indefeasible (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. *A title or interest that is not indefeasible continues to be defeasible and is 'liable to be set aside in the hands of any person or body to whom it may subsequently be transferred' (s. 340(2)(a)) and any interest subsequently granted thereout is liable to be set aside in the hands of any person or body in whom it is for the time being vested (s. 340(2)(b)). A defeasible title or interest continues to be defeasible and will only become indefeasible when title is acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser* (proviso to s. 340(3)) (emphasis added).

**[86]** No room was left in *Kamarulzaman* at [38-39] for doubt that the defeasible title or interest of an immediate purchaser is liable to be set aside, and that the defeasible title or interest of an immediate purchaser only becomes indefeasible when it is subsequently passed to a *bona fide* subsequent purchaser:

> [38] In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were *bona fide* purchasers. But unfortunately, both the trial court and the Court of Appeal failed to inquire whether the fifth and or sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that the *bona fides* of an immediate purchaser is not a shield to defeasibility. **The defeasible title of a *bona fide* immediate purchaser is still liable to be set aside**. **The defeasible title of a *bona fide* immediate purchaser only becomes indefeasible when it is subsequently passed to a *bona fide* subsequent purchaser.** That the fifth and sixth respondents were *bona fide* purchasers could not by that fact alone give a shield of indefeasibility. The fifth and or sixth respondents only acquired

an indefeasible title if they were *bona fide* subsequent purchasers. *But for the fifth and sixth respondents to have been bona fide subsequent purchasers, there must have been an immediate purchaser in the first place. The first to fourth respondents, from whom the fifth and sixth respondents obtained title, were not immediate purchasers. Rather, they were imposters of those entitled to the estate of the deceased***.** They, like the fake Boonsom who impersonated the true Boonsom, had no title to pass to the fifth and sixth respondents. The fifth and sixth respondents who were the immediate purchasers, acquired a title that was not indefeasible. But when the fraudulent title of the first to fourth respondents were set aside by the default judgment, the defeasible title of the fifth and sixth respondents was also defeated (emphasis added).

[39] Accordingly, in relation to leave question 1, which should read as 'What was the effect of the judgment in default, which set aside the (order of distribution of) the estate of the deceased, to the transfers (by the first to fourth respondents) to the fifth and sixth respondents?', we would answer that the defeasible title of the first to fourth respondents was set aside by the default judgment, and that on the instant facts, the defeasible title of the fifth and sixth respondents was swept aside along with that of the first to fourth respondents. In relation to leave question 3, which should read as 'Whether the transfers by (the first to fourth respondents) to the fifth and sixth respondents were protected by s. 340 of the National Land Code?', we would answer that the fifth and sixth respondents were immediate purchasers and so were not protected by the proviso to s. 340(3). We need not answer leave question 2, as our aforesaid answers are already more than sufficient to dispose of this appeal.

**[87]** To acquire an indefeasible interest, the first respondent must be a subsequent purchaser in good faith and for valuable consideration. Let it be assumed *arguendo*, that the first respondent was a subsequent purchaser. But if the first respondent was a subsequent purchaser, then who was the immediate purchaser? Was Wong that immediate purchaser? If Wong were not that immediate purchaser, then the first respondent could not be a subsequent purchaser. Now whether Wong was a purchaser must be judged from s. 5 of the NLC which provides "purchaser means a person or body who in good faith and for valuable consideration acquires title to, or any interest in land". Could Wong wear the hat of purchaser? Could a forger of pertinent instruments of dealing be a purchaser in good faith in the first place? "… the basic element of good faith is the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry into a transaction. But the overriding consideration is 'the particular circumstances of each case' (See *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465; *Ong Ban Chai &*

*Ors v. Seah Siang Mong* [1998] 3 CLJ 637; [1998] 3 MLJ 346)" (*State Tailor Sdn Bhd v. Nallapan* [2005] 2 CLJ 167; [2005] 2 MLJ 589 per Richard Malanjum JCA, as he then was, delivering judgment of the court).

**[88]** To repeat, the undisturbed finding of the trial court was that Wong forged the signature of the attorney of the appellant on the discharge of charge that Wong presented together with a forged document of title and false pelan tanah to enable registration of the forged discharge of charge, transfer, and charge. In fact, the first respondent submitted that the leave question was "not a fact sensitive question at all". The first respondent accepted that Wong was the forger, *albeit* of the discharge of charge. There was no evidence that the transfer was forged. But both the transfer to Wong and charge to the first respondent could not and would not have been registered in the first place without the forged discharge of charge. Wong, who authored the forgery, knew that. And Wong, who authored and presented the forgery for registration that opened the way for registration of the transfer and charge, could not have acted in good faith. The transfer was not forged. But the transfer could not have been registered without the forged document of title (version 6). Even when viewed in isolation, the transfer was not in good faith. But the entire transaction should be viewed as a single transaction. Transactions which are practically contemporaneous should be considered a single transaction (see *Home Trust Co v. Zivic* (2007) 277 DLR (4th) 349). Also, the conduct of Wong should be viewed in totality and as a whole. The transfer would not have been registered but for the forgery of the discharge of charge. Wong surely knew that the Chings had not redeemed the said land from the appellant to effect a transfer of the said land, free of the charge, to him. That however was no obstacle to Wong, who forged the discharge of charge to engineer a transfer free of the charge. There could be no question about it. Wong defrauded the appellant of its charge. When viewed in totality, the overall conduct of Wong was criminal. It would rub salt to the wound if it were held that Wong was a purchaser in good faith. The cruellest cut of all would be that Wong, the forger, would have the right to redeem the said land if it were held that the charge was indefeasible.

**[89]** Wong was not a purchaser. Even if Wong could be a purchaser, he was not a purchaser in good faith. Since Wong was not a purchaser in good faith, Wong could not be the immediate purchaser in good faith and for valuable consideration.

**[90]** I would answer the leave question as follows: a chargee is a purchaser within the meaning of the proviso. But the interest of a charge is defeasible, if the chargee were not a subsequent purchaser in good faith and for valuable consideration. Whether a purchaser is an immediate or subsequent purchaser is not determined by a tally of the number of transactions. Transactions could be contrived by fraudsters and accomplices (see '*Deferred and Immediate*

*Indefeasibility: Bijural Ambiguity in Registered Land Title Systems*' by Pamela O'Connor, Edin LR Vol 13 pp. 194-223). A purchaser is a subsequent purchaser only if his title or interest were derived from an immediate purchaser (his vendor) in good faith and for valuable consideration. For the title or interest of the subsequent purchaser to be indefeasible, both immediate and subsequent purchasers must be purchasers in good faith and for valuable consideration (see *Wright v. Lawrence* 278 DLR (4th) 698 at [39] per Gillese JA, delivering the judgment of the court).

**[91]** In the instant case, as there was no immediate purchaser in good faith and for valuable consideration, the first respondent was Z in the final illustration of Tan Sook Yee. The interest of the first respondent was immediate and defeasible.

**[92]** I would allow the appeal with costs and restore the orders of the trial court against the first respondent. As for the orders of the trial court against the second and third respondents, they should be settled by the fresh appeal to be filed by the second and third appellants against the decision of the trial court, and further appeal, if any.

**[93]** Immediate indefeasibility gives certainty. But unless a security system is statutorily in place to prevent fraud and forgery, such as, but not limited to, the attendance of parties before the registering authority, as well as an indemnity scheme to compensate proprietors for the errors of the registering authority, deferred indefeasibility should remain, to protect innocent proprietors against fraud and forgery.